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IN THE

Supreme Court of the United States

OCTOBER TERM [redacted] 1969

No. 273

CEFERINO PEREZ CARRIL,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To The Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Petitioner, Ceferino Perez Carril, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit affirming a judgment entered against him in the above-entitled case on February 13, 1968 upon which the Petitioner was sentenced on March 18, 1968 to a term of imprisonment of three years on Count One, and an eight-year suspended sentence and five years probation on Count Six.

A. The Opinion Below

The opinion of the Court of Appeals in this case has not as yet been officially reported. It is set forth in Appendix A annexed to this petition.

B. Jurisdiction

The judgment of the Court of Appeals was entered on March 17, 1969. A petition for rehearing was denied by the Court of Appeals on May 22, 1969.

The jurisdiction of this Court is invoked under Rule 19 of the Supreme Court Rules and Title 28, U.S.C., Section 1254(1) on the ground that review by the Supreme Court by writ of certiorari is sought of a judgment of affirmance on appeal by the United States Court of Appeals for the Second Circuit.

C. Questions Presented

The questions specifically presented are:

1. Whether or not the Petitioner was prejudiced when:

   (a) He was tried with others on a charge of a single, over-all conspiracy, although the evidence conclusively established that he was not a participant in any such conspiracy;

   (b) The Court permitted the jury to convict the petitioner of participation in a single, over-all conspiracy, although no evidence supporting such a verdict had been presented to the jury, and the jury in fact convicted the petitioner of participation in a single conspiracy.

2. Whether the Petitioner was prejudiced by the Trial Court's refusal to charge, in response to the request of petitioner's counsel, that the jury could consider as evidence of the petitioner's innocence statements made by the principal witnesses against the petitioner, including sworn statements before the Grand Jury and unsworn statements to investigators,

that flatly contradicted the principal testimony against the petitioner by these witnesses at the trial and that strongly exculpated the petitioner of any guilt whatsoever.

D. The Statutes

The statutes involved are: United States Code, Title 18, Sections 371, 472, and 473.

E. Statement of Matters Involved

The Petitioner and six others were charged in a six-count Indictment. Count One being an overall conspiracy count, and the other five being substantive counts charging violations of the laws against counterfeiting. The petitioner was named in only one of the substantive counts. Several of the original accused pleaded guilty prior to trial and testified. The petitioner was tried together with Gonzalez-Carta and Cepero on Count One, Two, Three and Six.

Count One charged all the defendants with conspiring between January 1, 1966 and August 7, 1967 to counterfeit One Million ($1,000,000.00) Dollars in United States currency in violation of United States Code, Title 18, Section 371.

Count Six ... , the only substantive count naming the petitioner . . . charged that the petitioner and Gonzalez-Carta, together with Castanera and Castro, possessed Three Hundred Four Thousand ($304,000.00) Dollars in counterfeit United States currency on March 30, 1967, in violation of United States Code, Title 18, Section 472.

As indicated above, two principal questions will be presented on this petition. The first question relates to the

petitioner's conviction as a participant in the single overall conspiracy set forth in the indictment and the Trial Judge's charge permitting such conviction.

With regard to this issue, we will set forth here in full the Government's version of its evidence that was presented to the Circuit Court of Appeals, even though it naturally tends to favor the Government, because we think it clearly establishes the total lack of basis for the conspiracy charged in the indictment and for the conviction of the petitioner on that charge.

The Government's evidence, as presented in the Government's brief to the Circuit Court of Appeals on pages 3-6 follows.

"In late February, 1966, Seferino Perez-Carril and Jesus Gonzalez-Carta, former Government officials in pre-Castro Cuba, were residing in exile in New York City. German Castanera, a Puerto Rico-born printer, had almost completed installation of a photo-offset shop for Perez-Carril, using equipment from the then defunct newspaper *El Mundo Americano* with which both Castanera and Perez-Carril had been associated. Perez-Carril and Gonzalez-Carta asked Castanera if he had the technical ability to reproduce the currency of any nation, and specifically Dominican Republic pesos. Castanera replied that he had the know-how, but would need a printing press. Explaining that there was a 'potential business' to be had in the distribution of counterfeit Dominican pesos through a friend of Gonzalez-Carta's, Perez-Carril and Gonzalez-Carta asked Castanera to price the necessary additional equipment. Gonzalez-Carta separately described the same scheme to Sergio Castro, a fellow Cuban refugee and a long-time acquaintance of

both Perez-Carril and himself, and agreed to introduce Castro to Castanera (T. 52-61, 228-29, 232-38, 434-39).

Early in March the printer Castanera told Gonzalez-Carta that it would take $500 to purchase a press. Gonzalez-Carta said he would give him the money the next day but voiced doubts about the reliability of Perez-Carril, suggesting that Castanera meet a friend of his. The next day Gonzalez-Carta introduced Castanera to his and Perez-Carril's friend Castro. The three agreed to attempt the counterfeiting of Dominican pesos and to share any profits equally. Thereafter, Gonzalez-Carta, without Castro's knowledge, gave Castanera $350 towards the purchase of a press. The printer Castanera went back to Perez-Carril and told him he did not want to continue working on the installation of the photo-offset shop. Perez-Carril voiced no objection and told Castanera to take home with him all the equipment—including a process camera, a vacuum frame, a drier, and a composition table, all previously purchased by Perez-Carril and worth $1,500. Castanera took the equipment and installed it in the basement of his house in New Jersey, together with a printing press purchased with Gonzalez-Carta's $350 (T. 73-88, 93-94, 253-63, 343, 439-43, 600-05, 626-31).

For technical reasons Castanera found that he could not reproduce the peso and reported to ex-Congressman Gonzalez-Carta that "the U. S. dollar would be easier." Interested, but dubious now as to Castanera's claimed ability, Gonzalez-Carta and Castro asked Castanera to print counterfeit drivers' licenses and draft cards for them. Pleased with the results, the two then determined to counterfeit United States currency and approached Perez-Carril for financial backing. Perez-Carril agreed to help

but cautioned them not to let Castanera know he was involved (T. 88-96, 443-55).

Gonzalez-Carta and Castro next asked Castanera how much expense money he would need to manufacture counterfeit United States currency. To the surprise of Castro, who still did not know of Gonzalez-Carta's funding of the press, Castanera said he would not need any at all, and agreed to print $1 million in counterfeit $20's, $50's, and $100's. Over the spring, summer, and early fall of 1966 Castanera printed in his basement and in another printing establishment in Manhattan two 'editions' of counterfeit 20-, 50- and 100-dollar bills, and one 'edition' of 20-dollar bills only, aggregating in face value approximately $840,000. He delivered the money to Gonzalez-Carta and Castro, who in September sold $10,000 in twenties to 'Charlie Cuba' for 12% of face value. Thereafter Castro and Gonzalez-Carta made a series of sales to Charlie Cuba totalling approximately $100,000 in counterfeit currency, principally in twenties, for a price that declined to 8% of face value after the second sale. They also made two sales to Alberto Cepero, a mutual acquaintance, totalling $10,000 in twenties, at 10% (T. 94-108, 455-95, 813-22).

In mid-December, Castro met Perez-Carril, reminded him of their earlier discussion of counterfeiting, told him they had gone ahead with the plan, and offered him a 10% price if he could 'get rid of' the counterfeit currency for them. The two met again by appointment the following day and Castro gave Perez-Carril a sample bill in each of the three denominations. Perez-Carril told Castro how they could get in touch with each other in the future (T. 495-98).

Shortly before Christmas 1966 Gonzalez-Carta fell out with Castro, telling Castro to keep his share of the money and saying he wanted nothing more to do with the 'operation.' Castro and the printer Castanera continued the business briefly as equal partners, printing a fourth and final 'edition' of approximately $100,000 in $20 bills only and making additional sales to Charlie Cuba and Cepero. Finally, in mid-January, Castanera and Castro in turn split up, dividing the remaining counterfeit currency evenly between them (T. 111-16, 498-504).

Subsequently, Castanera described his participation in the counterfeiting scheme to Perez-Carril, who said he had 'suspected' as much 'because of some incident' involving Gonzalez-Carta in New York. Castanera then asked Perez-Carril for help in finding a place to store his share of the contraband. Perez-Carril requested samples of the product and said he would 'see what he could do with them' (T. 120). The following day he took Castanera to an apartment on West 56th Street in Manhattan, gave him the keys, showed him a closet and instructed him to put the currency there 'because he didn't want some people that came into the apartment for another purpose to see or to touch it' (T. 119). Castanera did so (T. 117-120).

Castro was arrested on March 29, 1967. A few hours later Perez-Carril called Castanera at his New Jersey home to advise him of the arrest and warn him not to leave any evidence in the house. A few hours after that, Secret Service agents arrived with a search warrant, found a single counterfeit bill and, later, some plates. They then arrested Castanera who led them to the 56th Street apartment. There, on the morning of March 30, the agents found negatives, stripping sheets, and $304,000 in counterfeit 20's,

50's, and 100's. The following day, March 31, Gonzalez-Carta was arrested (T. 121-22, 141-70, 424-30, 516; GX 4A-4G, 5A-5D, 8, 9).

In early April, Perez-Carril, who had not been arrested, encountered Castro and his girl friend, Tamara Pino, who were free on bail, and learned that Castro still had counterfeit currency for sale at 10%. In May Perez-Carril ordered $50,000 from Castro and took delivery of $20,000 (in all three denominations)—for which Castro was never paid. In June, Castro was again arrested in New Jersey and surrendered the last of his hoard, $80,950 in all three denominations (T. 521-22, 526-31, 798-801, 827-29; GX 7)."

The second issue, as stated above, relates to the Trial Court's refusal to charge that the jury could consider as affirmative evidence of the petitioner's innocence previous statements by the principal Government witnesses against the petitioner, both sworn and unsworn, with regard to the heart of their testimony against the petitioner. As to this point, there can be no question that the previous statements contradicted the essential testimony upon which the Government's case upon the petitioner rested, and were dramatically exculpatory of the petitioner.

POINT ONE

Reversible error occurred when the Petitioner was tried with others as an alleged participant in a single, overall conspiracy, although the Government's evidence itself conclusively refuted that charge, and when the Trial Court permitted the jury to convict the Petitioner of participation in such a conspiracy, and the jury in fact so convicted the Petitioner.

Nothing can be clearer than that there was a total failure on the part of the Government to establish that the petitioner had participated in a single, overall conspiracy of the kind described in the indictment. The trial testimony, even as presented by the Government in its brief to the Court of Appeals, makes that obvious.

What happened here is a perfect illustration of the misuse for the conspiracy technique to convict a defendant through the impact of evidence wholly unrelated to his own activities. It is a technique that is wholly unfair, that is widely used, and that can only be stopped by the intervention of this Court.

Following the Government's version of their own evidence, this is what the trial testimony showed with regard to the conspiracy charged.

One. The petitioner engaged in a conversation with Gonzalez-Carta and Castanera with regard to the latter's ability to reproduce the currency of the Dominican Republic. Thereafter, Gonzalez-Carta brought another person, Castro, into the arrangement and in effect eliminated the petitioner from it because of doubts about the petitioner's "reliability."

There is not a scintilla of evidence that the petitioner thereafter participated in the scheme to counterfeit Dominican pesos. It was suggested by the Government below that petitioner's action in releasing to Castanera certain equipment previously purchased by him for the installation of a photo off-set shop might somehow be connected with the conspiracy. This argument is wholly untenable in light of the overwhelming evidence that at that point the petitioner had been dropped from the arrangement.

Two. Thereafter, Castanera found that he could not reproduce the Dominican pesos and suggested to Gonzalez-Carta that "the United States dollar would be easier." Gonzalez-Carta and Castro, dubious as to Castanera's ability, asked him to print counterfeit driver's licenses and draft cards. Satisfied with the results, these two determined to counterfeit United States currency, and approached the petitioner for financial backing.

The petitioner allegedly agreed to help but in fact his financial help did not prove necessary and the conspiracy proceeded without any evidence of petitioner's involvement whatsoever.

Three. During the Spring, Summer, and Fall of 1966, Castanera printed two editions of counterfeit Twenty, Fifty, and One Hundred Dollar bills, and one edition of Twenty Dollar bills only. This money was delivered to Gonzalez-Carta and Castro who starting in September of 1966 made a series of sales to two other people. Again, there is no evidence of any involvement whatever of the petitioner in these activities which represented the heart of the conspiracy charged in Count One.

Four. In Mid December, Castro met the petitioner and quoting the Government's version of what occurred, "re-

minded him of their earlier discussion of counterfeiting, told him they had gone ahead with the plan, and offered him a 10% price if he could 'get rid of' the counterfeit currency for them."

Surely, nothing can be more clear than that the petitioner would not have had to be informed of the fact that the others had proceeded with the conspiracy if he had been in any way involved in the conspiracy. Thereafter the petitioner received a sample bill in each of three denominations. Once again, it hardly needs to be argued that that receipt did not establish the Petitioner as a part of the on-going conspiracy.

Five. Thereafter, Gonzalez-Carta broke up with Castro and left the "operation". Castro and Castanera continued briefly as equal partners, printing a final "edition" of Twenty Dollar bills. In mid-January the two remaining members of the conspiracy split up, dividing the remaining counterfeit currency evenly.

We submit that it is obvious that at this point the conspiracy charged in the Indictment had terminated, the three members of the conspiracy had severed their relationships with each other, and that there is no hypothesis by which it could be advanced that the conspiracy that had commenced previously was still in existence.

Six. Thereafter Castanera described his participation in the counterfeiting scheme to the Petitioner who indicated that he had "suspected" as much—hardly the statement of a man who had been an active participant in the conspiracy. Castanera then asked petitioner for help in finding a place to store his share and petitioner allegedly brought him to an apartment where the currency could be kept. Surely, accepting this testimony as true, it would establish a separate

conspiracy between the petitioner and Castanera with regard to the counterfeit bills then possessed by Castanera. More than that can not be made of this episode.

Seven. Petitioner allegedly informed Castanera of Castro's arrest on March 29, 1967 and shortly thereafter Castanera himself was arrested.

Eight. In early April, petitioner allegedly ordered from Castro, then free on bail, Fifty Thousand ($50,000.00) Dollars in counterfeit currency and took delivery of Twenty Thousand ($20,000.00) Dollars. Once again, accepting this testimony as true, it might tend establish a separate conspiracy at that point between Petitioner and Castro with regard to the counterfeit currency that was involved. Surely, it provides no basis for a finding that the petitioner was a participant in the original conspiracy that had long since been terminated by the three conspirators who had planned and executed it. What the Government's evidence spells out, if accepted, is petitioner's participation in two separate criminal episodes, occurring after the termination of the conspiracy and the complete splitting up of the principal conspirators. We think it extraordinary that the petitioner, on this evidence, could have been convicted of participating in a single, overall conspiracy of the kind charged. There was no basis in the evidence for such conviction and there was no basis in the evidence for permitting this question to go to the jury.

This trial perfectly illustrates the fallacy that was succinctly stated by the Court of Appeals in *United States* v. *Borelli*, 336 F. 2d 376, 384 (2nd Cir. 1964).

> "The view that if the evidence warrants the finding that some defendants were parties to a single agree-

> ment to sell contraband for a nine-year period, it necessarily does so as to every defendant who has conspired with them at any time for any purpose, is thus a considerable over-simplification." *United States* v. *Borelli, supra,* at page 384.

To say that the petitioner was not prejudiced by what occurred is surely an exercise in unreality. The bulk of the evidence submitted at the trial had no legitimate connection with the petitioner whatsoever. If the petitioner had been properly tried, the bulk of the evidence heard by this jury covering the entire conspiracy to manufacture and distribute counterfeit bills would never have been presented to this jury.

The true significance of what occurred is that it illustrates an understandable but systematic disregard for the rights of the accused in multi-defendant cases by sweeping people together who have no legitimate connection in order to simplify the presentation of proof by the Government and render impossible an effective defense.

This practice, as illustrated by the trial below, is one of broad significance in the area of criminal jurisprudence in this country and urgently requires the corrective attention of this Court.

POINT TWO

The trial court committed reversible error when it refused to charge the jury, as requested by Petitioner's counsel that the jury could consider as substantive evidence of Petitioner's innocence, prior statements by the principal witnesses against the Petitioner that not only contradicted their trial testimony at its most critical points, but clearly were significantly exculpatory.

It is surely clear that there were two essential items of testimony against the Petitioner upon which the Government's case almost wholly rested.

First was the testimony of Castanera that the Petitioner made available space for him to maintain his share of the counterfeit currency (T. 119-120). The second was the testimony of Castro that the petitioner had ordered Fifty Thousand ($50,000.00) Dollars from Castro and accepted delivery of Twenty Thousand ($20,000.00) Dollars of counterfeit currency.

In Castanera's testimony before the Grand Jury he stated in substance that he obtained the apartment not from the petitioner but from Castro (T. 403). In Castro's testimony before the Grand Jury he swore that he "never in my life had a discussion with him (the petitioner) about counterfeit money" (T. 723).

The weight to be assigned by the jury to these previous statements under oath, flatly contradictory to the most vital parts of the witness' trial testimony, were surely of critical importance in the case below. Counsel specifically requested the Court to charge that the Grand Jury testimony might be considered for the truth of the facts con-

tained and not merely for impeachment purposes (T. 1413). This request was denied by the Court.

The issue seems to us to be an important one in the area of criminal evidence. Although the decisions of the Court of Appeals in *United States* v. *DeSisto*, 329 F.2d 929 (2nd Cir. 1964) cert. denied 377 U.S. 979 (1964) and in *United States* v. *Muccio*, 373 F.2d 168 (2nd Cir. 1967) cert. denied 387 U.S. 906 (1967) may be reconciled on the particular facts. We think it clear that these cases disclose basically divergent attitudes towards an evidential issue of complexity and importance.

Obviously, the testimony before the Grand Jury of the two essential witnesses, traditionally viewed, is hearsay. It would be violative of basic principles to permit such testimony to be used against defendants who are wholly unrepresented before the Grand Jury. The use of such testimony in behalf of defendants presents a very different problem and one that merits consideration by this Court.

The testimony, which was exculpatory of the petitioner, was adduced by the Government in the course of the Grand Jury investigation that resulted in the indictment in the very case that was tried. Certainly, the Government had ample opportunity to cross-examine these witnesses before the Grand Jury. There is no reason to doubt that to the extent to which testimony of witnesses before the Grand Jury seemed untrue or unreliable to the United States Attorney that cross-examination would be availed of to disclose its falsity to the Grand Jury.

Thus, as to the Government we submit that the hearsay objection, which rests upon lack of opportunity to cross-examine is wholly untenable. If a defendant wishes such

testimony to be presented as affirmative evidence on his behalf, we see no basis in principle for denying such a request. We think it completely unrealistic to contend, as was done by the Court of Appeals in its opinion, that the petitioner had the full benefit of the previous inconsistencies. Although the charge was not entirely explicit as to the use that could be made of the previous statement, certainly the general instruction of the Court was that prior inconsistent statements should be considered on the issue of credibility.

Surely, it cannot be doubted that the value to the petitioner of the previous sworn testimony of the key government witnesses against him would have been significantly enhanced if the jury knew, as we contend they should have, that the previous statements could be considered affirmatively as tending to establish the petitioner's innocence.

We submit that the issue is important, that the state of the law is unclear, and that the time is appropriate for this Court to address itself to the question.

CONCLUSION

For the reasons here and above set forth, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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LEONARD H. SANDLER,
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APPENDIX A

Opinion of the Court

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 132, 133—September Term, 1968.

(Argued December 2, 1968 Decided March 17, 1969.)

Docket Nos. 32318, 32668

UNITED STATES OF AMERICA,

Appellee,

—v.—

JESUS GONZALEZ-CARTA and CEFERINO PEREZ-CARRIL,

Defendants-Appellants.

Before:

LUMBARD, *Chief Judge,*
FRIENDLY, *Circuit Judge* and RYAN, *District Judge.**

Appeal from judgments of conviction for violation of the United States Currency Laws, Sections 371, 472 and 473, Title 18, United States Code, entered in the United States District Court for the Southern District of New York, by Tenney, *J.*, after conviction by jury. Judgments affirmed.

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* For the Southern District of New York, sitting by designation.

JACK KAPLAN, Assistant U. S. Attorney, Southern District of New York (Robert M. Morgenthau, U. S. Attorney, and Daniel J. Sullivan and Douglas S. Liebhafsky, Assistant U.S. Attorneys, Southern District of New York, on the brief), *for Appellee.*

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ALBERT J. KRIEGER, Esq., New York, New York, *for Defendant-Appellant Ceferino Perez-Carril.*

RYAN, *District Judge:*

Defendants appeal from judgments of conviction for conspiracy to violate and for violation of the currency laws of the United States (Sections 371, 472 and 473, Title 18, U. S. C.).

Both appellants, along with a co-defendant Cepero, were convicted of conspiracy to counterfeit one million dollars in United States currency (Count I); and with two other defendants, Castanera and Castro, who did not stand trial, of unlawful possession of $304,000 counterfeit United States currency (Count VI). Appellant Carta, with Castanera and Castro, was also convicted of unlawfully selling $100,000 counterfeit United States currency (Count II).

Cepero, who was given a suspended sentence, has not appealed. Appellant Carta received a five year prison sentence and a ten year suspended sentence; and appellant Carril received a three year prison sentence and an eight year suspended sentence.

The principal error urged by Carril on the appeal is that the trial judge failed to charge that the Grand Jury testimony of Government witnesses might be considered as affirmative evidence and not merely as prior inconsistent statements impeaching their trial testimony. Additionally, Carril contends that he was prejudiced by the receipt of evidence not properly admissible against him, in that multiple conspiracies were proved.

Appellant Carta argues as a sole ground for reversal that the trial evidence is insufficient as a matter of law to sustain his conviction on any of the three counts—the conspiracy, the unlawful sale or the possession of counterfeit United States currency on which he was sentenced.

The record establishes that the evidence was more than adequate. The Government's proof came principally from two witnesses—Castanera and Castro.

Castanera, a printer, and Carril, a former Cuban Government official, had been associated with a defunct newspaper, El Mundo Americano; with equipment from this newspaper, they had gone into the photo offset business. Carta, a former Cuban Government official, was a friend of Carril and joined with Castanera and Carril to discuss the possibility of going into the business of printing counterfeit Dominican Republic pesos. Castanera was to do the printing; he priced the cost of a printing press and Carta gave him $350.00 toward its purchase. At this point, Carta informed one Castro, a mutual friend of appellants, of the plan and later introduced him to Castanera. It was contemplated that Castro was to replace Carril, for Carta was beginning to have doubts as to Carril's reliability. Castanera reported to Carril that he was not interested in con-

tinuing to work on the photo offset business and Carril told Castanera that he could take the equipment, which Carril had paid for and which was worth $1500, to Castanera's home. When the counterfeiting of the Dominican Republic pesos proved unsuccessful, the three—Castanera, Carta and Castro—agreed to counterfeit United States dollars. They told Carril that they intended to raise money for Cuba and asked Carril for financial backing, which he agreed to provide, but he was apparently never called upon to do so. Castanera was not to know that Carril was involved. With the printing press purchased by Carta and the other equipment donated by Carril, Castanera manufactured two editions of counterfeit $20, $50 and $100 bills and one edition of $20 counterfeit bills—aggregating $840,000; and gave them to Carta and Castro, who sold them to Cepero and another. In December, 1966, Castro met with Carril, reminded him of their earlier plan to counterfeit and asked him if he could dispose of some of the counterfeit money. This Carril agreed to do and took some samples. Shortly thereafter, Carta left the enterprise, giving his share of the money to Castro, and Castro and Castanera continued into a fourth edition of $20 bills, amounting to $100,000, part of which they sold and the rest of which they divided. Then the two split up. Castanera then told Carril of his activities and asked him to help him hide his share of the counterfeit currency. Carril, after requesting samples, gave Castanera the keys to an apartment and instructed him where to hide the money. When Castanera was taken into custody, $304,000 in all denominations was found in the apartment. When Castro was arrested, it was Carril who informed and warned Castanera not to leave any evidence in his house. Even after Castro's first arrest,

Carril made a further purchase on credit of $20,000 in bills from Castro, for which he never made payment. When Castro was arrested the second time, he had in his possession $80,950 in counterfeit bills of the three denominations.

This, in sum, was the testimony of Castro and Castanera after their plea of guilty. Apparently, it is the contention of Carta that his acquittal should have been directed because the proof of the conspiracy rested on the testimony of Castanera, who had given perjurious testimony before the Grand Jury, and because proof of possession and sale by Carta had not been established beyond a reasonable doubt.

The testimony we have set forth above fixed Carta along with Carril as one of the major operators of the conspiracy. Carta brought Castro into the venture; he introduced him to Castanera; and he financed the purchase of the printing press. Carta, as a witness, admitted knowing that Castanera and Castro were in the counterfeiting business, but denied any participation in it and denied that he had lived in the hotel at which Castro and Castanera testified they had regularly met with him during this time. In rebuttal, the Government established his residence at the hotel by the hotel manager. It was for the jury to determine whether Castro was to be believed, or whether he had perjured himself hoping thereby to obtain some consideration from the Government. The trial judge properly so charged.

Although Carta left the enterprise around the end of 1966, he was found guilty of possessing with the others the counterfeit money found in the apartment in March, 1967, on the evidence that he had given his share of the

counterfeit money to Castro and had agreed to contribute to the rent for the apartment where it was stored; and had initially supplied the samples and the printing press on which was printed the fourth edition which followed his disagreement with Castro.

The charge of the Court was concise and clear. The jury was reminded of Carta's departure from the conspiracy before the fourth edition of counterfeit bills had been printed. It was instructed that it could not find Carta guilty of unlawful possession in March, 1967, unless it found that he had been a member of the conspiracy, that part of the counterfeit money found in March, 1967, was printed in furtherance of the conspiracy, and that some of it had been printed before Carta's withdrawal. It was correctly charged that, by leaving his share of the counterfeit money with Castanera and permitting its storage in the apartment, even if Carta otherwise had parted company with the group, it might be found that he was furthering the continuing object of the conspiracy, i.e., the disposal of the currency (*United States* v. *Borelli,* 336 F. 2d 376 (1964, 2d Cir.); *Hyde* v. *United States,* 225 U. S. 347 (1912)).

As for Carril's argument that there were several conspiracies, the evidence supported a finding of one conspiracy, and the jury was so charged. The purpose of the conspiracy was at all times the manufacture, possession and distribution of counterfeit currency.

While the indictment charged the counterfeiting of United States currency, the evidence as to the original plan to counterfeit Dominican pesos was properly received as background showing how the conspiracy charged burgeoned with the same equipment and the same actors. It

required but a step to switch to dollars when the printing of the pesos proved beyond Castanera's ability. The printing of false identification cards was but another step in this scheme for the purpose of giving Castanera a little practice and enabling him to show the others what he was capable of producing. It is admitted that Carril was in the original conspiracy to counterfeit Dominican currency. There was also evidence that he was informed of the decision to switch to dollars and that he agreed to lend the necessary funds for the changeover. That Carril may have appeared more active in the beginning when it was pesos they were to counterfeit, only to surface again months later when Carta had left and when Castro had been arrested, did not change the character of the conspiracy or the singlemindedness of the conspirators to engage in the counterfeiting business.

Finally, we come to Carril's argument concerning the Grand Jury testimony of Castro and Castanera.

As we have recounted, Castanera at the trial testified that, at his request, *Carril provided him* with the apartment in which to store some of the counterfeit money. On cross-examination, defense counsel elicited from him that he, Castanera, had told the Grand Jury that *Castro and not Carril* had made the arrangements for the apartment and that he was absolutely sure that he had not made any arrangements about it with Carril. Similarly, at the trial, Castro testified that Carril knew and had expressed approval of the idea that Castanera print United States dollars for the purpose of buying guns in Florida; that he had promised to finance the operation; that he had met him in December, 1966, at which time Carril had obtained

samples of counterfeit money from Castro, had discussed the market with him and had later agreed to buy $50,000 notes from Castro and had taken $20,000 worth on credit. Before the Grand Jury, however, Castro had testified that he had never discussed counterfeit money with Carril.

The point made here by Carril is that he was entitled to have the jury instructed that the prior inconsistent testimoney before the Grand Jury given by these witnesses could be considered by the jury, not merely as impeaching their testimony on the trial but as substantive evidence exculpating Carril, to be given the same weight as that given on the trial which inculpated him. The request was made orally at the end of the Judge's charge. In all fairness to the Judge and to the Government, it should have been made in writing before the charge. It could have been denied on this ground alone (*United States* v. *Kahaner*, 317 F. 2d 459 (2d Cir.), *cert. den. sub nom., Corallo* v. *United States*, 375 U. S. 836). The danger inherent in not complying with Rule 30 is emphasized in this case where the trial judge, taken by surprise by the oral request, at first stated he would so charge but later, coming to the conclusion that the case was controlled by *United States* v. *Nuccio*, 373 F. 2d 168, denied the requested charge. In fact, the charge was totally silent on this point, except that generally the jury was instructed that any witness might be discredited by prior contradictory evidence and that it was for the jury alone to determine what weight it would give such witness' testimony. There was no instruction that they might not consider the prior Castro and Castanera Grand Jury testimony as affirmative evidence of Carril's innocence. Obviously the jury believed the

testimony given at trial rather than the testimony before the Grand Jury. In any event, the appellant had the benefit of the Grand Jury testimony which, in a most material point, directly contradicted the trial testimony of both Government witnesses so that, whether the jury believed the Grand Jury statements per se to be true or not, it was left free to disbelieve the trial testimony of both Castro and Castanera and all that they had testified to which inculpated Carril. More than that, Carril was not entitled to (*United States* v. *Nuccio, supra*). *United States* v. *Borelli,* 336 F. 2d 376 is not in point.

The touchstone to reversible error is prejudice to the defendant. In view of the fact that appellant had the benefit of the Grand Jury testimony and that the jury was free to consider it in determining whether the testimony at trial was to be believed, he can hardly complain that he was prejudiced.

The convictions are affirmed.

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No. 273

In the Supreme Court of the United States

OCTOBER TERM, 1969

CEFERINO PEREZ CARRIL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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357-928—69

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 17, 1969. A petition for rehearing was denied on May 22, 1969. The petition for a writ of certiorari, filed on June 23, 1969, is out of time under Rules 22(2) and 34(1) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence established the existence of a single conspiracy.

2. Whether petitioner was entitled to an instruction that the grand jury testimony of two government witnesses, which contradicted their trial testimony, could be considered as substantive evidence.

STATEMENT

A six-count indictment charged petitioner and six others with conspiracy to violate the federal counterfeiting laws (count one), and five completed substantive offenses in violation of 18 U.S.C. 472. Petitioner, named in the conspiracy count and in count six—possession of $304,000 in counterfeit currency on March 30, 1967—was convicted on both counts. On March 18, 1968, he was sentenced to three years' imprisonment on count one and to eight years' imprisonment, suspended in favor of five years' probation, on count six. The court of appeals affirmed (Pet. App. A).

The evidence showed that in late 1965 petitioner was the general manager of a Spanish language newspaper in New York City which was forced to close because of labor difficulties (Tr. 46).[1] After an attempt to publish a successor newspaper failed, petitioner, in February 1966, arranged with an employee, co-defendant German Castanera,[2] who was an expert in photographic offset printing, to form a printing

[1] The trial transcript ("Tr.") has been combined in two volumes, and filed with the Clerk of this Court.

[2] Castanera and co-defendants Sergio Castro and Tamara Pino pleaded guilty to the conspiracy and to various substantive counts in which they were named. All three testified for the government at petitioner's trial.

company, using equipment from the newspaper. Although petitioner promised to solicit business, he failed to secure any work for the company. Instead, petitioner and two other co-defendants, Jesus Gonzalez-Carta and Sergio Castro, planned to use Castanera's talents to counterfeit Dominican Republic pesos (Tr. 55–59, 437–438, 442–443). When Castanera was advised of the scheme by petitioner and Gonzalez-Carta, he said that he was interested; he was then told to determine what equipment he needed to do the counterfeiting (Tr. 61). Early in March 1966, Castanera told Gonzalez-Carta that he would need $500 for a printing press. Gonzalez-Carta then expressed doubts about petitioner's "reliability," and the next day he introduced Castanera to Castro. Castanera agreed with Castro and Gonzalez-Carta to go ahead with the counterfeiting of Dominican Republic pesos and to share the profits equally (Tr. 81). When Castanera sought to terminate his partnership with petitioner in the printing business, petitioner agreed and even asked Castanera to take the business equipment, worth about $1,500 (Tr. 85–87). Castanera installed this equipment in his basement, together with a printing press purchased with funds furnished by Gonzalez-Carta (Tr. 87, 93–94).

Because of technical difficulties, Castanera was unable to make an acceptable reproduction of the Dominican Republic peso (Tr. 89–90). Castro and Gonzalez-Carta then became dubious of Castanera's talents

[3] Gonzalez-Carta and co-defendant Alberto Cepero were tried jointly with petitioner.

and decided to test him by requesting that he counterfeit drivers' licenses and draft cards (Tr. 76–77, 445). Pleased with the results of that test, the two then decided to arrange for the counterfeiting of United States currency, which Castanera had said was easier to reproduce than the peso (Tr. 95, 451). Castro and Gonzalez-Carta discussed the proposed change in plans with petitioner, who agreed to provide financial assistance but cautioned them not to let Castanera know that he was involved (Tr. 455).

During the spring, summer, and fall of 1966, Castanera printed $840,000 in counterfeit 20-, 50-, and 100-dollar bills, and delivered the money to Castro and Gonzalez-Carta. They passed some of the bills and sold others at a fraction of their face value (Tr. 96–108, 457–487). In mid-December 1966, Castro presented petitioner with samples of the counterfeit bills and offered the currency to him at 10 percent of face value. Petitioner retained the samples (Tr. 495–496).

In the following month Gonzalez-Carta left the enterprise. Castro continued the business with Castanera briefly before they, too, decided to part company. They divided the remaining counterfeit currency evenly between them (Tr. 111–116, 498–504).

Castanera took his share to his house in Bergenfield, New Jersey, where petitioner visited him in January 1967. He told petitioner about the currency and said that he wanted to remove it from his house. Petitioner told Castanera that he had an apartment on 56th Street in Manhattan, where the money could be stored, and he also took some samples of the cur-

rency (Tr. 117–118). The next day petitioner took Castanera to the apartment, gave him the keys, and showed him a place in a closet to hide the money (Tr. 118–120). Petitioner said that he would "see what he could do" about disposing of the money (Tr. 120).

Castro was arrested on March 29, 1967. A few hours after the arrest, petitioner notified Castanera by telephone and cautioned him not to have any of the evidence at home (Tr. 121). Castanera was arrested that same evening, however, and a search of his premises by Secret Service agents uncovered one counterfeit bill and some plates. The next morning Castanera led the agents to the 56th Street apartment, where they retrieved counterfeiting equipment and notes with a face value of $304,000 (Tr. 423–430).

At the time of his arrest, Castro turned over to the Secret Service some of his share of the counterfeit currency, but he secretly retained an additional amount (Tr. 516). In early April 1967, he told petitioner that he still had some money left to sell. In May, petitioner requested $50,000 on credit. Castro refused to supply that amount, but agreed to give petitioner $20,000 immediately and the balance after he had paid 10 percent of the face value (Tr. 529). Petitioner took delivery of the money, but never paid Castro (Tr. 530). In June 1967, Castro was arrested for bank robbery, and at that time he surrendered the remainder of his share, about $85,000 in counterfeit currency (Tr. 531).

ARGUMENT

1. Contrary to petitioner's contention, the evidence fully supports the jury's conclusion that there was a unitary criminal enterprise and not multiple conspiracies.[4] The evidence showed that petitioner was involved in the scheme from its inception, having participated in the planning for counterfeiting pesos and in the initial proposal to Castanera concerning his ability to print currency of "any country" (Tr. 55–56). After his newspaper ventures failed, petitioner kept his association with only one employee, Castanera, whom he knew to be an expert in photographic offset printing. He ostensibly formed a printing business with Castanera, but he never fulfilled his obligation to obtain legitimate printing work for Castanera. When the printing shop was abandoned, with petitioner's concurrence, as Castanera became more deeply involved in the counterfeiting, petitioner prevailed upon Castanera to take the costly printing equipment and allowed it to be installed in the basement of Castanera's home. In the meantime, the details of the plan to print currency were being formulated by petitioner and other co-conspirators.

Thereafter, Castro and Gonzalez-Carta became the prime participants in the counterfeiting operation with Castanera, while petitioner moved to the sidelines. But

[4] The court instructed that proof of several independent conspiracies was not proof of the single conspiracy charged in the indictment, and that if the jury found that the government's evidence failed to establish one conspiracy, it had to acquit petitioner and the two co-defendants who were tried with him (Tr. 1388–1389).

when financial assistance was required for the change-over from pesos to dollars, the co-conspirators turned to petitioner. The absence of evidence of petitioner's direct involvement in the management of the enterprise was explained at trial as a consequence of his desire, expressed to Castro and Gonzalez-Carta, that his participation should be concealed from Castanera.

The conspiracy did not end with Castro's arrest in March, since he clearly intended to continue selling counterfeit money, which he resumed doing four days after his arrest. By this time Castro and Castanera had terminated the remaining counterfeiting operation. But petitioner maintained a link between them and continued his dealings with both of them concerning the marketing of the counterfeit. He never communicated a desire to withdraw. His own testimony, rejected by the jury, was simply that he was never aware of the counterfeiting conspiracy in the first place (Tr. 1064–1076).

In short, the evidence showed that petitioner was one of the parties to a large, common plan, "joined together by their knowledge of its essential features and broad scope, though not of its exact limits, and by their common single goal." *Blumenthal* v. *United States*, 332 U.S. 539, 558. Although petitioner did not participate in all of the counterfeiting transactions, the evidence of these other acts was admissible to show the full extent and operation of the conspiracy. As the Second Circuit stated in *United States* v. *Dardi*, 330 F. 2d 316, 329 (C.A. 2), certiorari denied, 379 U.S. 845:

> * * * Those who participate in such transactions do not supply the government with a simple and clear picture. The picture, even as on a jigsaw puzzle, only comes into vision by the assembling of hundreds of curiously shaped parts, each piece seemingly having no identity until it is fitted into and made a part of the whole. * * *

See *United States* v. *Hickey*, 360 F. 2d 127, 140 (C.A. 7), certiorari denied, 385 U.S. 928. Even in the absence of a single-conspiracy charge, all of the transactions properly could have been joined in a single indictment or consolidated for a single trial. And the conduct of the trial here reduced to a minimum the danger from the admission of evidence not related to petitioner because the transactions involving others were inextricably intertwined with petitioner's complicity in the scheme. See *Berger* v. *United States*, 295 U.S. 78; *United States* v. *Agueci*, 310 F. 2d 817 (C.A. 2), certiorari denied, 372 U.S. 959.

2. In their testimony before the grand jury, both Castro and Castanera had made statements regarding petitioner's involvement in the counterfeiting scheme which they later contradicted at trial. Castro had told the grand jury that he never discussed counterfeit money with petitioner, while at trial he stated that petitioner had approved the plan, obtained samples of currency, and thereafter requested $50,000 in counterfeit notes and received nearly half that amount. Castanera had testified before the grand jury that Castro provided him with the 56th Street apartment to hide his money. At trial he said that petitioner provided the apartment, and explained that he had

not wanted to involve petitioner at the time of the grand jury hearing (Tr. 326). Following the court's closing instructions, petitioner made a belated request to charge that the grand jury testimony of government witnesses Castro and Castanera might be considered as affirmative evidence and not merely as prior inconsistent statements impeaching their trial testimony. The court considered the request but declined to give the instruction.

The district court's determination is consistent with the general rule that prior inconsistent statements of a witness are admissible only for the purpose of impeachment. See *Bridges* v. *Wixon*, 326 U.S. 135, 150–154. In *United States* v. *DeSisto*, 329 F. 2d 929 (C.A. 2), certiorari denied, 377 U.S. 979, the Second Circuit formulated a limited exception to this rule, holding that where a witness called to establish a fact denies knowledge of it, the proponent may show as affirmative evidence that the witness had testified to that fact at a previous trial involving the same issue or before the grand jury. In *United States* v. *Nuccio*, 373 F. 2d 168 (C.A. 2), certiorari denied, 387 U.S. 906, the same court distinguished *DeSisto* from a situation, like the present case, where the witness testifies to the existence of a particular fact and cross-examination establishes a prior contradiction. There, the court said the self-contradiction itself accomplishes the objective of destroying credibility without the further step of converting a government witness into a witness for the defense. The court indicated that it "would be loath to disturb a trial judge's refusal" to allow the prior testimony to serve as sub-

stantive evidence (373 F. 2d at 173). The panel which heard petitioner's appeal held that this issue was controlled by *Nuccio*, and declined to find error in the district court's ruling.[5] This decision is not in conflict with the holdings of the courts of appeal[6] and does not warrant further review.

Moreover, in this case the trial judge did not charge that the grand jury testimony of Castanera and Castro could be considered only for impeachment purposes. Thus, petitioner's jury had the option of fully crediting the prior testimony rather than the trial testimony of these witnesses. By its verdict, the jury evidently chose to believe the inculpatory trial testimony and reject the contradictions.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1969.

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[5] The panel below included Judge Friendly, the author of both the *DeSisto* and the *Nuccio* opinions.

[6] Other circuit courts have chosen not to follow *DeSisto*. *Byrd* v. *United States*, 342 F. 2d 939 (C.A.D.C.); *United States* v. *Crowder*, 346 F. 2d 1 (C.A. 6), certiorari denied, 382 U.S. 909; *United States* v. *Schwartz*, 390 F. 2d 1 (C.A. 3).

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